

STATE OF MICHIGAN
COURT OF APPEALS

CINDY ANN SCHNEIDER,

Plaintiff-Cross-Appellee,

v

GREGORY G. SCHNEIDER,

Defendant-Cross-Appellant.

UNPUBLISHED

October 28, 2003

No. 245578

Oakland Circuit Court

LC No. 01-656857-DM

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiff appealed as of right the judgment of divorce in this case.¹ Defendant cross-appealed contesting the portion of the trial court's property award concerning his retirement plan and its order requiring defendant to pay a share of plaintiff's attorney fees. Because the trial court invaded defendant's separate estate without citing one of the statutory exceptions discussed in *Reeves v Reeves*,² we reverse its decision to grant plaintiff a share in the premarital value of defendant's retirement account. Given the significant disparity in the parties' income, however, we find no error with the award of attorney fees. We affirm in part and reverse in part.

"This Court reviews a property distribution in a divorce case by first reviewing the trial court's factual findings for clear error, and then determining whether the dispositional ruling was fair and equitable in light of the facts."³ A finding is clearly erroneous if, after a review of the entire record, this Court is firmly convinced that a mistake has been made.⁴ But a dispositional

¹ This Court dismissed plaintiff's appeal for failure to file a brief but maintained defendant's cross-appeal. *Schneider v Schneider*, unpublished order of the Court of Appeals, entered May 15, 2003 (Docket No. 245578.)

² 226 Mich App 490; 575 NW2d 1 (1997).

³ *Olson v Olson*, 256 Mich App 619, 622; ___ NW2d ___ (2003).

⁴ *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

ruling is discretionary and will be upheld unless we are convinced that the division was inequitable under the circumstances.⁵

Defendant initially argues that the trial court improperly awarded plaintiff half of the premarital value of his 401(k) plan. We agree. As a general rule, while marital assets are subject to division, the parties' separate assets may not be invaded.⁶ As stated by this Court in *Reeves*:

The distribution of property in a divorce is controlled by statute. In granting a divorce, the court may divide all property that came "to either party by reason of the marriage" When apportioning marital property, the court must strive for an equitable division of increases in marital assets "that may have occurred between the *beginning* and end of the marriage." . . . Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party. However, a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met.

The first exception to the doctrine of noninvasion of separate estates is found at MCL 552.23; MSA 25.103. Subsection 1 of this statute permits invasion of the separate estates if after division of the marital assets "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party" As interpreted by our courts, this means that invasion is allowed when one party demonstrates additional need. . . . The other statutorily granted method for invading a separate estate [MCL 552.401] is available only when the other spouse "contributed to the acquisition, improvement, or accumulation of the property." When one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation.^[7]

As an asset that defendant possessed before his marriage to plaintiff, the premarital value of defendant's retirement plan is not subject to division unless one of the abovementioned statutory exceptions applies. Here, the trial court cited principles of equity in granting plaintiff a portion of the premarital value of defendant's 401(k) plan, but failed to support this decision under the statutory framework discussed in *Reeves*. The trial court demonstrated awareness of the exceptions set out in *Reeves* when it refused to invade defendant's separate property interest in the marital home, finding that the marital estate was sufficient for plaintiff's support. We note that the trial court never qualified this finding by stating that the marital estate was only sufficient to support plaintiff if the premarital value of the 401(k) was included. General

⁵ *Id.* at 429-430.

⁶ *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002).

⁷ *Reeves*, *supra* at 493-495 (citations omitted).

principles of equity do not constitute a sufficient reason for the invasion of separate property under either of the statutory exceptions discussed in *Reeves*.⁸

The record also fails to support an invasion of the premarital value of defendant's 401(k) under the second statutory exception, MCL 552.401, discussed in *Reeves*. There was no evidence presented at trial regarding any increase in the value of the premarital portion of the pension, or the reason for any such increase. As a result, there is no way to gauge plaintiff's involvement in its growth. Absent evidence that plaintiff contributed to the premarital value of defendant's 401(k), she is not entitled to a portion of this asset under the statute.

Defendant further contends that the trial court erred in ordering him to pay \$10,000 of plaintiff's attorney fees. We review a trial court's grant of attorney fees for an abuse of discretion on appeal.⁹ A trial court may order a party to a divorce to pay the other party's reasonable attorney fees if the record supports a finding that financial assistance is necessary.¹⁰ The purpose of awarding attorney fees in a divorce action is to prevent a party from invading assets relied upon for support in order to obtain representation.¹¹

The record shows that defendant's attorney fees in this case were approximately \$17,000 and that plaintiff's attorney fees were approximately \$45,000. There was also evidence presented that defendant was earning \$69,7000 a year as a senior project manager for General Motors Corporation at the time of trial, and that plaintiff was making \$10.00 per hour working for Meijer Incorporated. Due to the disparity in income between the parties, the trial court did not abuse its discretion in ordering defendant to pay a portion of plaintiff's legal fees.¹²

To the extent defendant challenges the trial court's award on the basis that the attorney fees were unreasonably exacerbated by plaintiff, we disagree. Plaintiff provided legitimate reasons to the trial court for changing attorneys. Likewise, defendant's argument that plaintiff needlessly increased her legal fees by litigating the issue of custody is without merit. If, as defendant claims, it was clear that he would be awarded custody of the children, then plaintiff acted reasonably in seeking a skilled attorney to vigorously represent her at trial on that issue.

We affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper

⁸ See *id.* at 494-495, 498.

⁹ *Olson, supra* at 634.

¹⁰ *Id.* at 635.

¹¹ *Id.*

¹² See *id.*